

Duress Is Not a Justification

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I. INTRODUCTION

Peter Westen's and James Mangiafico's recent article arguing that duress is a justification is interesting, provocative, and dead wrong.¹ It barely dents (never mind demolishes) the majority view that duress is an excuse, one grounded on the notion that it is unjust to punish someone who has violated the criminal law only because he failed to resist a motivation that could not have been resisted by anyone who claims the right to punish him.

Westen and Mangiafico (hereinafter "W & M") make two major errors. First, W & M show that hypothetical cases that are identifiable as duress on relatively uncontroversial criteria are analyzable as cases of justified action. While they succeed in this effort, they fail to show that there is no case of duress that can also be analyzed as a case of excuse. That is, they fail to show that duress is a justification in the sense that they apparently intend: that duress is in all cases a justification and never an excuse.² Second, to the extent W & M believe that their examples can be analyzed as justification but not as excuse, they are mistaken. They misconceive excuse, confusing it with non-fault. While their arguments and examples show that fault is present in duress cases, W & M say little or nothing about genuine excuse. As a result, they fail to demonstrate that duress cases are exclusively analyzable as justification. It is possible to reconfigure W & M's thesis to make it more plausible. But it is an open question whether the reconfiguration would be acceptable to them and, in any event, the reconfiguration does not capture all that we want to accomplish with an excuse of duress.

II. THREE WAYS OF LOOKING AT DURESS

According to W & M, a case of duress has three identifying features: a three party relationship; a purposefully coercive threat; and less protection for the defendant than self-defense but more protection than necessity.³ It is the last feature that occupies W & M for the most part. They focus on the fact that whereas self-defense doctrine authorizes the use of deadly force to oppose the

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¹ Peter Westen & James Mangiafico, *The Criminal Defense of Duress: A Justification, Not an Excuse—And Why It Matters*, 6 BUFF. CRIM. L. REV. 833 (2003).

² See *id.* at 925.

³ *Id.* at 842.

lesser harm of kidnapping or rape, duress does not allow one to use more force or to inflict greater harm on a bystander than one is threatened with by an aggressor.⁴ I cannot kill a bystander to save my own life from an aggressor, nor can I kill a bystander to spare myself an assault at the hands of an aggressor, nor can I assault or kill bystanders to fend off an aggressor's threat to my property. W & M are also concerned to explain why duress is available when a defense of necessity is not; that is, when the balance of harms does not favor the defendant's violating the law.⁵ In a classic example based on the Model Penal Code, I can run over two drunks lying in the road if my passenger holds a gun to my head and tells me to do it; but in a case of natural necessity, such as a brake failure on a mountain road, I cannot run over two drunks lying in the road if the alternative is killing only myself by swerving to avoid them.

W & M find the key to these features of duress in the fact that duress is confined to human threats and is unavailable against natural threats. They argue that duress fits with the justifications because it is a matter of choosing the lesser evil from the defendant's point of view.⁶ They account for the availability of duress where necessity is not available by arguing that the calculus of evils must be sensitive to context, including the nature of the threat.⁷ Where the threat is a purposively coercive threat by another human being, this is itself a distinctive evil that often will outweigh apparently greater evils from other sources. As a result, it is often not the case that an apparently greater evil (two dead drunks) actually outweighs the purposively coercive threat to the (one) defendant from an aggressor. W & M support this analysis by pointing to self-defense. It is just this kind of context-sensitive evaluation of evils, appreciating the full significance of human threats, that accounts for self-defense's authorization of a disproportionate response of deadly force in defending oneself against rape or kidnapping. When viewed according to this hierarchy of contextually-evaluated threats, the justifications include duress in a slot between self-defense and necessity.⁸

This argument is clever and plausible, but it falls short of demonstrating that duress is a justification in the sense that W & M apparently have in mind: that it is exclusively a justification and not an excuse. To begin with, there is nothing remarkable about duress cases being analyzable as justification. Take a textbook case of duress: *State v. Toscano*.⁹ Toscano was a chiropractor who owed a gambling debt to some gangsters. One of the gangsters told Toscano that if he refused to sign some medical reports to facilitate an insurance fraud scheme, then

⁴ See *id.* at 855–57.

⁵ *Id.* at 857–62.

⁶ *Id.* at 916.

⁷ *Id.* at 923–24.

⁸ *Id.* at 931–44.

⁹ 378 A.2d 755 (N.J. 1977). *Toscano* is used to illustrate duress in a leading criminal law casebook. See SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 845 (7th ed. 2001).

he and his wife would be hurt in some way. Toscano signed the forms. The case can be analyzed as one of duress: the threat of injury to Toscano and his wife was one that a person of reasonable firmness would not have been able to resist. But the case also can be analyzed as one of justification. The property loss from insurance fraud was a lesser evil than the threatened physical harm to Toscano and his wife.

Furthermore, there is nothing new in the suggestion that the harms at issue in cases of justification must be evaluated in a context-sensitive way. Two common contextualizing moves make it a simple matter to analyze most cases of duress as lesser evils. First, prospective harms must always be discounted by their probability. Changes in this discounting often can change an apparent choice of the greater evil into a choice of lesser evil. In *Toscano*, for example, a lesser-evils defense is more plausible if the likelihood of the gangster's succeeding in the insurance scam is portrayed as remote and the injury to Toscano and his wife is portrayed as imminent and virtually certain. Conversely, Toscano can be seen as choosing the greater evil if we suppose that the insurance fraud is assured of success, while the threat to Toscano and his wife is delivered by a puny and inept gangster.

Second, to overcome a defendant's claim of justification, his conduct must be shown to be "at fault"—usually on a reasonableness standard—and this, like all fault inquiries, serves to contextualize our evaluation of the defendant's conduct. To understand this point, it is necessary to explain why and how fault is shown in justification cases. Any justification defense is the rest of the prohibition, so to speak. To clarify: It is not unlawful to kill a human being; it is unlawful to kill a human being without a good reason to do so (without a justification), such as self-defense or the defense-of-others. If the state wishes to punish, then it must show that the prohibition was violated completely, not just in part. This is why the prosecution bears the burden, in self-defense and other justifications, of persuading the jury that some element of the justification is absent from the case: that there was no imminence, or no necessity, or no proportionality in the response, and so on. But under a modern elements approach to criminal fault, as found in the Model Penal Code, the state must do even more than this. If the prosecution must show criminal fault with regard to each and every element of the offense as defined, then the continuity between offense elements and the absence of a justifying circumstance implies that the prosecution *must show criminal fault with regard to the absence of a justifying circumstance as well*. Typically, it must show that the defendant was negligent—unreasonable—with regard to there being no imminence, or no necessity, or no proportionality in the response, or whatever the case may be. This inquiry can result in an acquittal, not on an actual justification, but on a mistaken justification, if the actor was reasonably mistaken.¹⁰ *Toscano*,

¹⁰ This analysis of mistaken justification differs fundamentally from that of George Fletcher and Paul Robinson, both of whom interpret mistaken justification as resulting in an excuse. See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 762–69 (1978); PAUL H. ROBINSON, *STRUCTURE*

for example, may have miscalculated the likelihood of the threat to his family and the relative harm of that discounted threat as compared to that of the insurance scam. However, he may not have miscalculated those relative harms unreasonably (it may have been a close call), and he may as a result be free of fault and therefore innocent.

Nothing in these contextualized analyses of Toscano's justification defense is inconsistent with his also arguing that he was under duress, or with his framing that duress argument in terms of an excuse. Toscano can make either of the arguments given above and also argue that, if they fail, he has a third possible ground of acquittal. If he is neither justified nor free of fault regarding his not being justified, then he should be acquitted nevertheless because he faced a threat that he could not withstand, and that no one who would punish him could have withstood either. No one, if faced with a choice between signing a fraudulent medical form and remaining idle while his loved ones are assaulted or killed, would choose the latter course. No one, therefore, has a moral right to punish Toscano. Although he has done wrong and is not justified, he is entitled to be excused.

Similarly, nothing in W & M's contextualizing argument—that, when evaluated in context, a purposive coercive threat from a human being is actually a greater evil than an apparently greater evil from another source—is inconsistent with an argument of duress or with framing that duress argument in terms of an excuse. When they adjust the evaluation of the purposive coercive threat from a human source upward relative to other threats from other sources, W & M do no more than expand the necessity defense. To take account of the distinctiveness of human threats in justification analysis is not to demonstrate that no duress case can be analyzed as excuse.

III. DURESS AND THE DISTINCTION BETWEEN FAULT AND FAIR CANDIDACY

W & M apparently suppose that they have demonstrated that duress must be analyzed exclusively as a justification and never as an excuse. If so, the most likely reason for their mistake is that they rely on a common but confused notion of what an excuse is. They write:

Defenses of excuse exist for the same reason that it is a defense to commit the *actus reus* of an offense without *mens rea*. A person who commits the *actus reus* of an offense without *mens rea* has a defense because, by virtue of lacking the purpose, knowledge, recklessness or negligence the statute requires, he lacks the motivation of malice, callousness, indifference, or neglect toward the interests of others that the statute regards as an essential condition to justly blaming him. The same

AND FUNCTION IN THE CRIMINAL LAW 102 (1997). Like W & M, Fletcher and Robinson fall victim to the ambiguity of "culpability" and confuse non-fault with excuse. See *infra* Part III.

is true of excuse. Indeed, excuse can be regarded as the genus for which lack of *mens rea* is species. An actor has a defense of excuse if he lacks the motivation that the statute regards as an essential condition for just blaming.¹¹

In this analysis, W & M fall victim to the ambiguity of the concept of “culpability.” They fail to distinguish between fault, or culpability as part of the structure of wrongdoing on one hand; and, on the other hand, non-excuse, or culpability in the sense of fair candidacy for punishment according to the conditions of responsibility.

When we find someone at fault, we are saying that their violation of a prohibition is more than a nominal violation, and that the defendant deserves punishment. If, for example, I kill another human being then I have violated the prohibition on homicide; but if the killing was wholly accidental—not only inadvertent, but also non-negligent—then it is only a nominal violation of the prohibition on homicide and I do not deserve punishment. The difference lies largely in the malice or callousness that W & M cite, though there is much more to this story. Criminal fault is an inference, drawn in the course of the adjudication of wrongdoing, to the effect that the practical reasoning of the defendant is deficient.¹² If I kill another human being purposely, then the reasoning that led me to kill, as represented by this intentional mental state, is deficient. However, it is important to see that the purpose to kill is indeed only *representative* of my deficient practical reasoning. The intentional state is an indicator of criminal fault; it is not identical to criminal fault.

In many places, the criminal law’s assessment of the quality of the defendant’s practical reasoning is not limited to the intentional state of mind that accompanies the conduct at issue. It extends, in addition, to the defendant’s set of standing motivations, or ends—to their acquisition, development, maintenance, and ultimate issuance in the alleged offense. The most familiar example of this kind of fault inquiry is criminal negligence, but the same kind of long-view assessment of the defendant’s practical reasoning is made under the doctrines of transferred intent, felony murder, and reckless indifference murder. It also shows up in the *ex post* normative determinations that judges and juries are asked to make within the familiar intentional state formulations of fault: for example, whether a risk is “substantial and unjustifiable” in the Model Penal Code’s definition of recklessness. From this perspective, criminal fault is an aspect of criminal wrongdoing. That is, the manner, circumstances, and specifics of the individual

¹¹ Westen & Mangiafico, *supra* note 1, at 872–73.

¹² This conception of fault is developed and defended in: Kyron Huigens, *Solving the Apprendi Puzzle*, 90 GEO. L.J. 387 (2002); Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 WM. & MARY L. REV. 943 (2000); Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423, 1458–62 (1995) [hereinafter Huigens, *Virtue*].

instance of wrongdoing alleged against the defendant are the subject matter of the adjudicative assessment of the quality of his practical reasoning.¹³

Non-excuse—fair candidacy according to the conditions of responsibility—is something entirely different from fault.¹⁴ For one thing, an excused actor usually *is* at fault. Attempted presidential assassin John Hinckley, for example, intended to kill a human being. However, as a separate matter, the state of his capacities or circumstances was such that he could not have been rationally addressed by the criminal law: he could not have been an equal participant in the collective, normative, conduct-governing, evaluative projects of the criminal law. To punish him, therefore, would have been to do nothing more than to use him as an example to others. In short, he was not a fair candidate for punishment. Non-excuse, unlike fault, is not a part of the structure of wrongdoing. One might say it concerns the prior question of whether it makes moral sense to hang the case on the structure of criminal wrongdoing at all.

Criminal fault as I have described it concerns the *quality* of the defendant's practical reasoning. Fair candidacy, in contrast, concerns the defendant's *capacity* for practical reasoning. Criminal fault is *indifferent* to moral luck—one is held responsible for the state of one's ends and practical reasoning on the ground that deliberation on ends is a feature of an ordinary moral life. Fair candidacy for punishment, in contrast, is *sensitive* to moral luck; to the fact that not all moral lives are ordinary, and that deliberation on ends is sometimes difficult, sometimes impossible, and sometimes simply irrelevant to one's actions. In Hinckley's case, for example, our inquiry into fault tells us that he deserves punishment for his attempt to kill—because our legal inquiry into fault is limited to the question of his purpose to kill. But his insanity defense presents a different question: whether it is fundamentally fair to apply that legal inquiry into fault (or any of the rest of the conceptual apparatus of the punishment system) to his case at all. As it happens, that question was answered in the negative: Hinckley was excused. He acted as he did only because, as a matter of moral luck, he was insane.

One way to see the distinction between fault and fair candidacy is to apply the test of an aggravating converse. Compare two common mitigating considerations: minor participation in the crime, and youth. Minor participation in a crime has an aggravating converse: a leadership role in a crime merits greater punishment. The level of participation is thus a fault element: it serves to grade this instance of the offense by means of its bi-directional relevance. Youth, in contrast, has no aggravating converse. A judge at sentencing might say to a defendant "You're old enough to know better," but this would only be to deny him the mitigation. The judge would never go on to use non-youth in an aggravating way. She would not say, "If you were middle-aged, I'd throw the book at you; and if you were elderly,

¹³ The imposition of responsibility for the state of one's ends is part of a system of just punishment, in part because the proper disposition of individual actors' ends is one of the objectives of punishment. Huigens, *Virtue*, *supra* note 12, at 1456–62.

¹⁴ See Kyron Huigens, *Rethinking the Penalty Phase*, 32 ARIZ. ST. L.J. 1195, 1245–54 (2000).

you'd be looking at a death sentence." Neither old age, middle age, nor youth serves to grade the offense. Youth ordinarily pertains to the threshold conditions of responsibility, or fair candidacy for punishment, and it bears primarily on excuse for offenses, mitigation in sentencing, and the jurisdiction of juvenile courts. Youth, usually, is a matter apart from the structure of wrongdoing.

The qualifiers "ordinarily," "primarily," and "usually" in that last paragraph are important. The distinction between fault and fair candidacy is not a distinction between *kinds* of elements, but rather between the *functions* to which elements are applied. Youth can serve as a fault element, even if it usually pertains to fair candidacy. In so-called statutory rape, youth grades the offense according to severity and defines the threshold between criminal and innocent conduct, both of which are functions of fault.

The problem with W & M's analysis of duress as an excuse is that they have confused non-fault and excuse. They describe excuse as an argument that one's conduct is "not the product of the kind of disregard of others that the jurisdiction at hand represents actors to have possessed when it publicly condemns actors for engaging in such conduct."¹⁵ But this is an argument of non-fault, not an argument of excuse. W & M go on to insist that an excuse of duress should not be recognized because to do so weakens the moral stringency of the criminal law. They write:

To be sure, one might argue that moral frailty in duress cases in [sic] unique, because actors whose moral frailty causes them to do the wrong thing in the face of threats simply "can't help it." But to say that an ordinary person whose moral frailty causes him consciously to do the wrong thing simply "can't help it" is to speak metaphorically. It's a metaphor for saying of him, "He wants it more than he should." And it is precisely when actors engage in misconduct because they want it "more than they should" that they become appropriate objects of public reprobation.¹⁶

This is an apt description of a person whose conduct exhibits fault. His long-term practical reasoning is deficient, and the law rightly holds him responsible for the wrongdoing that his disordered ends lead him to commit. W & M undoubtedly are correct when they say, in effect, that our standards of criminal fault should reflect our condemnation of this shoddy practical reasoning, and that to do otherwise would weaken the stringency of the criminal law. The problem is that this has nothing to do with excuse. We inquire into fault in punishment because the governance of long-term practical reasoning and the assembly and maintenance of a defensible set of ends is one of the main functions of punishment. But if an aggressor holds a gun to the defendant's head, then her own powers of practical

¹⁵ Westen & Mangiafico, *supra* note 1, at 874.

¹⁶ *Id.* at 912 (citation omitted).

reasoning have been effectively incapacitated and her own ends have been rendered irrelevant. We will excuse her for the crime she is ordered to commit, but not for a lack of fault. The bank employee with a gun to her head intends to deprive the bank of its money, and commits a complete theft. While the law, including its inquiries into fault, is stringently indifferent to moral luck, we who would presume to punish find it impossible not to accommodate moral luck at the extremes of adversity. We do this when we excuse in cases of minority and insanity, and we also do it in the more contingent, occasional instances of practical reason's incapacitation by duress.

W & M give examples in which fault is present and the only plausible defense the defendant can offer is justification.¹⁷ But it does not follow from this that duress cases are not cases of excuse. As in the Hinckley case, fault may be present when the defendant nevertheless is not a fair candidate for punishment and should be excused on that ground. In *Toscano*, we might conclude that the insurance scam was of such a magnitude that it did in fact outweigh the prospective harm to Toscano and his family. We might conclude, further, that Toscano was unreasonable when he concluded otherwise. Nevertheless, if the prospective harm to Toscano and his family was still very great, we might conclude that any one of us who proposes to punish Toscano would have done the same thing that he did. If so, it would not be fair for us to punish him. Because he is not a fair candidate for punishment, we would excuse him.

There might seem to be a contradiction in this analysis between saying that Toscano acted unreasonably and saying that most of us would have done the same thing he did. There is no contradiction, however, because these are two different questions. The first asks whether Toscano has violated a reasonable person standard of conduct, a question having to do with the quality of his practical reasoning. The second asks whether he has exhibited the fortitude of a person of reasonable firmness, a question having to do with his *capacity* to engage in practical reasoning or to give effect to his own reasoning in the circumstances of the offense.

¹⁷ In one of the few examples they offer in this part of their article, W & M write:

Thus, imagine that *X* threatens *DI* that *X* will injure a child who suffers from a mild ear-ache unless *DI* appropriates *V*'s car and drives the child to the hospital. In the event *DI* does as ordered, two things obtain: *X* is, indeed, guilty of unjustifiably causing *DI* to appropriate *V*'s car, because *X* knowingly causes the appropriation to occur without being confronted with an appropriate choice of evils; and yet *DI* is not guilty of unjustifiably appropriating *V*'s car, because he *is* confronted with a choice of evils, and, being so confronted, he makes the appropriate choice under the circumstances by using *V*'s car to save the child.

Id. at 917. Here, *DI* is at fault in that she purposely or knowingly steals *V*'s car, and is justified for the reason given. Neither of these conclusions is inconsistent with *DI*'s also being excused if the threat to the child were sufficient to incapacitate *DI*'s practical reasoning and render *DI*'s own ends moot.

This is a subtle distinction in part because it turns on the functions to which the inquiries are put. A person's fortitude, like his reasonableness, could be put to use as a fault element. To do wrong when one knows better can be an aspect of wrongdoing that helps to justify and grade punishment for that wrongdoing, just as the reasonable person standard is ordinarily used. But this does not preclude us from putting fortitude to work in connection with fair candidacy as well. If our concern is not the virtue of the defendant but instead the virtue of the punishing majority, then we in the punishing majority might well refrain from punishing in those cases where the lack of fortitude is such that we probably share it, and where to punish the person who lacks fortitude would be hypocritical on our part. In other words, we might excuse the defendant on grounds of duress.

IV. DURESS AS NON-FAULT REGARDING THE ABSENCE OF A JUSTIFYING CIRCUMSTANCE

It is possible to reconfigure W & M's thesis to reconcile it to the preceding points while still retaining three of its principal features. However, even the reconfigured thesis fails to exclude the possibility of duress as an excuse.

Duress as an excuse is premised on the idea that it is unfair to punish someone of ordinary fortitude who nevertheless did wrong, precisely because their fortitude is ordinary, even if inadequate; that is, because no one who would presume to punish this wrongdoer would have made a different choice under the same circumstances. The question of ordinary fortitude might be an empirical one, but the decision not to punish for this reason is of course a normative one. This is not an easy or obvious normative choice for a reason that I alluded to above: the defendant's insufficient fortitude can be taken as a reason *to* punish as easily as it can be taken as a reason *not to* punish. We can treat the question of the defendant's fortitude as one of fault. We can say that a defendant who is so weak willed as to give in to the temptation to embezzle money from his partners is at fault in part because of that character flaw. We have not drafted our theft statutes in a way that requires proof of lack of fortitude, or that grades the offense by relative levels of fortitude. But we can say that the defendant's intention to deprive others of their property reflects, among other things, his failure over time to develop an acceptable level of fortitude, or resistance to temptation.

The relevance of fortitude to fault does not preclude its also being relevant to fair candidacy. If the defendant does wrong and does so either intentionally or unreasonably, we might still conclude that it is fundamentally unfair to punish him. We might conclude this if he is six years old or if he is flagrantly insane, because to punish such defendants would reveal us, the punishing majority, to be a cruel and barbaric people. We might also conclude that it is fundamentally unfair to punish a defendant if punishment in his case would reveal us to be self-righteous and hypocritical. If the defendant embezzled from his partners because his family was being held hostage, then without reassessing the defendant's intentions or what they ordinarily tell us of fortitude, we can nevertheless decline to punish this

defendant. We can leave our conclusions about fault and wrongdoing in place and excuse on grounds of duress. He faced a hard choice and made the wrong choice, with fault, but even a person of reasonable firmness would have done so.

Notice, however, that it is difficult to keep the analysis of the defendant's wrong choice under circumstances of a hard choice from collapsing into our assessment of his mistake about whether he was justified in acting as he did. If W & M have an argument, this is it. The argument is not that duress is a justification. Instead, the argument is that the centerpiece of duress, fortitude, is more relevant to fault than it is to fair candidacy. If this is so, then cases of duress should be analyzed as cases of mistaken justification, in which the defendant is said to be not at fault; and these cases should not be analyzed as excuses, in which the defendant is conceded to be at fault but is said to be unfairly subject to punishment. Our embezzler might have believed that stealing was the right thing to do, in light of the greater evil threatening his family. If he was wrong about this and is not actually justified, we can say nevertheless that he was reasonably wrong about it, and is not at fault regarding the absence of a justifying circumstance.

This approach preserves three important features of W & M's thesis: the notion that duress should be analyzed as a matter of wrongdoing by the defendant rather than as a matter of fairness by the punishing majority; the notion that a context-sensitive evaluation of the defendant's wrongdoing is important to the defense; and the notion that duress as an excuse fails to protect the stringency of the criminal law.¹⁸ The differences between W & M's thesis and this reconfigured thesis are that the part of wrongdoing to which duress pertains is not justification but rather fault regarding the absence of a justifying circumstance; that the context-sensitive evaluation of the defendant's wrongdoing occurs in the adjudication of individual cases and not in the general legislation of defenses; and that acquittal on grounds of non-fault due to mistake is nevertheless an acquittal that detracts from the law's stringency. If W & M are out to eliminate an excuse rather than to establish a justification, then these differences might not matter to them. If the analysis of fault regarding the absence of a justifying circumstance captured all that we want to say about duress, then I might join W & M in proposing that we abolish the excuse of duress and require defendants to argue duress only insofar as it is premised on non-fault.

I cannot speak for W & M, of course, but no such *rapprochement* will be forthcoming from my side. I do not think that either a justification argument or a non-fault argument captures all that we mean to say or do when we recognize duress as an excuse.

Here is a scenario that I believe calls for an excuse of duress. Suppose that Dad goes to pick up his three-year-old daughter from daycare and finds that Deranged is holding her class hostage. As it happens, Deranged has a gun to the head of Dad's child and states that he intends to kill her. Dad pleads with Deranged to let him take his child in peace. Deranged tells Dad that he can do so

¹⁸ *Id.* at 910.

if Dad kills the other children in the room. Carefully keeping his gun to the head of Dad's child, Deranged kicks a second gun toward Dad, out of the extensive arsenal Deranged has piled up in a corner of the classroom. Dad picks up the gun and kills the other children—let's say there are five of them—and, miraculously, Deranged is true to his word. Dad escapes with his child.

I would analyze this case as duress premised on excuse in this way. Dad's wrongdoing here is complete. Dad has violated the prohibition on killing human beings, and none of the exceptions to that prohibition obtain. While he has defended the life of his daughter, no version of defense-of-others will allow Dad to do this at the cost of five innocent lives. Lesser evils, however one conceives of it, is a basic principle of all the justifications, including defense-of-others, and Dad has clearly opted for the greater evil. Furthermore, Dad cannot possibly argue that he was mistaken about a justification. He knows that from any objective point of view, he has created more harm than he has prevented. Dad's only defense lies in the fact that when he acted he could not possibly have made that objective point of view his own. He did wrong and committed a crime, and he did so knowingly and deliberately. But he did this because he did not have the fortitude to watch his own child die when he was in a position to prevent it.

The only conceivable ground on which Dad could be acquitted is an excuse premised on the notion that no one who would presume to punish Dad would have the fortitude to watch his own child die were he in a position to prevent it, and that therefore no one who would presume to punish Dad has a moral right to do so. The traditional ban on duress in homicide cases should not preclude such an argument because that ban can only be premised on an equality of lives or a net-savings-of-lives principle, either of which is a stray bit of lesser evils rationale that is irrelevant to the excuse claimed here.

It is not obvious that Dad ought to be excused here. We might well conclude, on careful consideration, that he should have displayed more fortitude and should not have inflicted five times as much grief as the grief he could not bear himself. I think it is obvious, however, that Dad's argument is a cogent one, and that the question is one that could not be decided as a matter of law. Dad has a defense, an argument, based on duress as an excuse. It is, moreover, an argument that is not quite captured by either a justification argument or an argument based on non-fault regarding the absence of a justifying circumstance.

V. CONCLUSION

In the end, I think Westen and Mangiafico underestimate the task they set themselves. They attempt to prove, and not just to illustrate, a conceptual point with cases. Justification and excuse are conceptually distinct defenses, but conceptually distinct defenses may be extensionally congruent. That is, arguments in the nature of justification and excuse may, and often do, apply equally well to a single set of facts. The ultimate categorization of the case as an instance of a defense—that is, whether *D*'s case is *really* one of excuse or justification—is

either a fact consisting of the jury's reasoning in its ultimate disposition of the case or, more plausibly, an unanswerable question (and, of course, with a hypothetical case, it is *really* unanswerable). Cases can illustrate the conceptual differences between the defenses, but it is too much to ask of any case that it prove a conceptual distinction between defenses by precluding all extensional overlap between defenses. W & M have demonstrated extensional overlap between justification and excuse arguments in cases of duress. They have *not* demonstrated that, conceptually speaking, duress is only a justification and never an excuse.